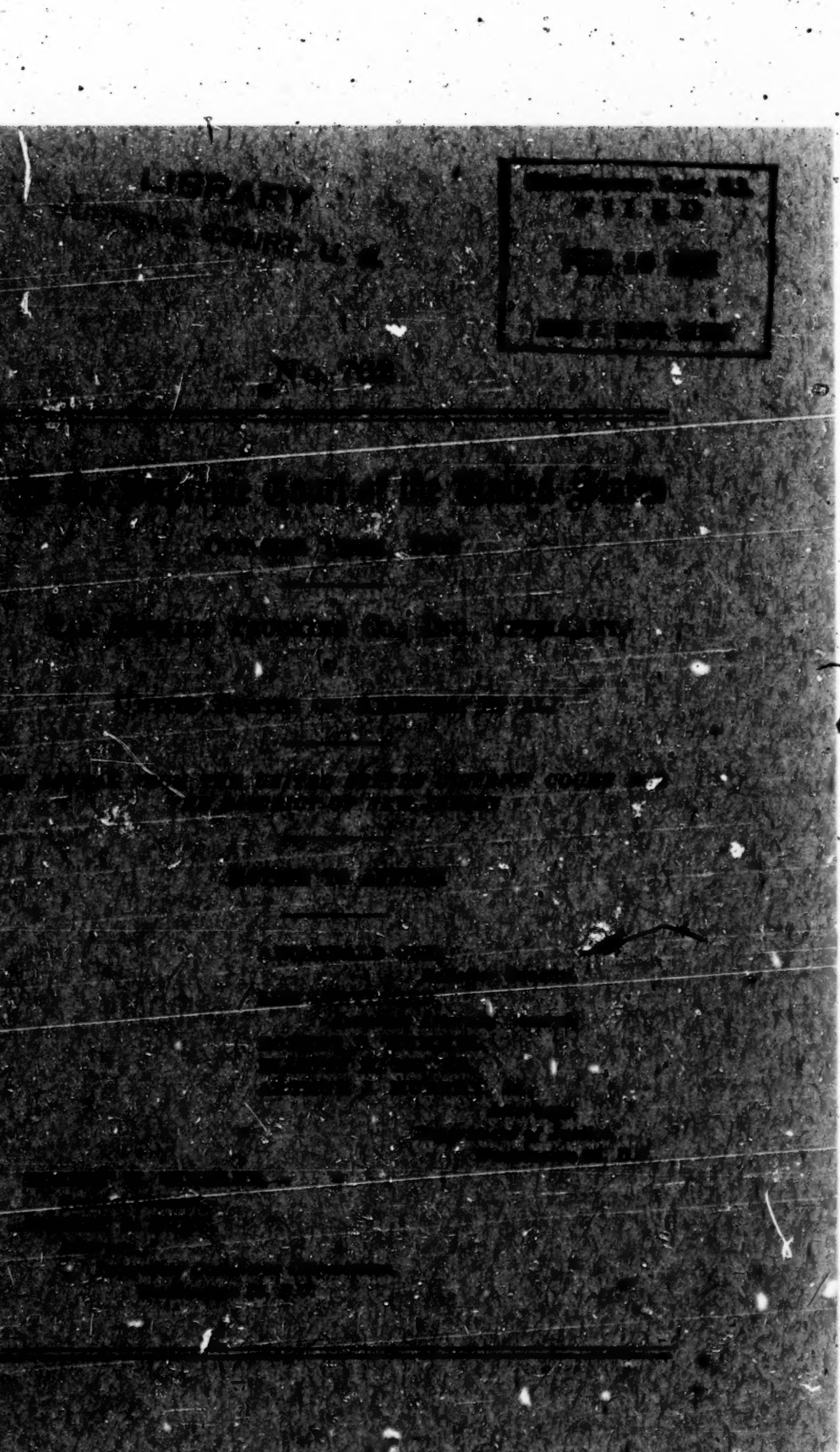

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 762

TAR ASPHALT TRUCKING CO., INC., APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

MOTION TO AFFIRM

Pursuant to paragraph 1(c) of Rule 16 of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a judgment of a three-judge district court, which dismissed appellant's complaint seeking to set aside an order (J.S. 17a) of the Interstate Commerce Commission. The Commission's order, issued under Section 212(c) of the Interstate Commerce Act, converted appellant's operating authority from that of a contract to a common motor carrier. Appellant's contract carrier operations were conducted under two permits issued in 1946 and 1948, which provided "relatively narrow territorial and

commodity authority" (J.S. 13a). The commodity authority was limited to bulk shipments of coal tar, coal tar distillates and residue, asphalt and asphaltic admixtures (J.S. 15a–16a). Appellant has operated mostly by tank truck (J.S. 7).

Section 212(c), under which the Commission acted, was part of the 1957 amendments of the Act. This legislation amended the definition of "contract carrier" in Section 203(a)(15) to limit such carriers to those operating under continuing contracts with one person or a limited number of persons, for the furnishing of transportation services either (a) "through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served" or (b) "designed to meet the distinct need of each individual customer."[1] Section 212(c) provides for the revocation of the contract carrier permit of, and the issuance of a common carrier certificate to, any permit holder whose operations on the effective date of

[1] The changes in the definition of a contract carrier were as follows (previous wording omitted by the amendment in brackets and new matter in italics):

"(15) The term "contract carrier by motor vehicle" means any person which [, under individual contracts or agreements,] engages in [the] transportation [(other than transportation referred to in paragraph (14) of this section and the exception therein)] by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (*other than transportation referred to in paragraph (14) and the exception therein*), *under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.*"

the Act (August 22, 1957) did not conform to the amended definition of contract carriage, were those of a common carrier, and were otherwise lawful. It further provides that the certificate thus issued "shall authorize the transportation, as a common carrier, of the same commodities between the same points or within the same territory as authorized in the permit."

In January 1958, the Commission instituted a proceeding under Section 212(c) to determine whether appellant's contract carrier permits should be revoked and a common carrier certificate issued in lieu thereof. After full administrative proceedings, the Commission, in its report on reconsideration, concluded, in the terms of the statute (J.S. 14a):

> [T]hat the operations of respondent on August 22, 1957, did not and presently do not conform to the definition of a contract carrier as set forth in section 203(a)(15) of the Interstate Commerce Act, as amended; that such operations are those of a common carrier by motor vehicle and are otherwise lawful.

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[2] The 1957 legislation also amended Section 209(b) of the Act to enlarge the Commission's authority to secure compliance by nonconverted and new contract carriers with the revised definition of contract carrier (see discussion, *infra*, pp. 6–7). The second proviso of Section 209(b) is:

"*Provided further*, that no terms, conditions or limitations shall be imposed in any permit issued on or before the effective date of this proviso which shall restrict the right of the carrier to substitute similar contracts within the scope of such permit; or to add contracts within the scope of such permit unless upon investigation on its own motion or petition of an interested carrier the Commission shall find that the scope of the additional operations of the carrier is not confined to those of a contract carrier as defined in section 203(a)(15), as in force on and after the effective date of this proviso."

The Commission's order revoked appellant's contract carrier permits and provided for the issuance of a substitute common carrier certificate. The certificate prohibited appellant from "tacking," that is, from combining its separate geographical operating authorities in the certificate to provide a through service it could not have provided under its permits.[3]

The Commission found that appellant was not contracting with "a limited number of persons" but was holding "itself out to any and all shippers who desire service within the scope of its relatively narrow territorial and commodity authority" (J.S. 13a). The Commission ruled that in such circumstances appellant's contracts with 19 individual shippers did not satisfy the statutory definition of contract carriage in Section 203(a)(15) that such carrier serve only a "limited number of persons," but, rather, were characteristic of the operations of a common carrier (J.S. 14a). The Commission held that appellant had not dedicated vehicles "for a continuing period of time for the exclusive use of each person served," with the "possible exception" of two tank trailers which were "apparently * * * set aside for the convenience of respondent" (J.S. 13a).[4] It also found that appellant was

[3] Contract carriers, unlike common carriers, have never been permitted to tack or join separate segments of their operating authorities at common service points in order to perform a through service. See *T. T. Brooks Trucking Co., Inc., Conversion Application, supra*, 81 M.C.C. 561, 572.

[4] Both of these trailers were set aside because of particular characteristics of the product to be transported. One tank trailer was reserved to avoid the necessity of cleaning the tank after each shipment and the other because the product required transport at high temperature (J.S. 11a). Both trailers could

not furnishing "a transportation service designed to meet the distinct need of each individual customer" (J.S. 13a), and that appellant's use of heating units and pumps with extra long hoses was not indicative of a distinctive or specialized service (J.S. 13a).

The district court, after a careful review of the evidence (J.S. 5a–7a), unanimously concluded that the Commission's findings that appellant did not meet the definition of contract carrier under the 1957 amendments were supported by substantial evidence (J.S. 3a–9a) and that its order was "within the scope of the Commission's statutory authority" (J.S. 9a). The court noted, among other things, that there was testimony that appellant had entered into at least 50 contracts since the effective date of the Act and that it "will enter into a transportation contract with any shipper" upon agreeable terms (J.S. 5a, 7a); that appellant allocated its equipment "as orders [came] in, and then only for the period of the particular order or job" (J.S. 5a); and that appellant operated special equipment not because of the distinct needs of particular shippers, but because of the characteristics of the commodities it transported (J.S. 5a–6a).

ARGUMENT

This case presents no substantial question warranting plenary consideration by this Court:

1. Appellant argues at length (J.S. 3–4, 12–17) that the evidence not only does not support the Commission's findings, but actually calls for a contrary conclusion. The court below, however, reviewed the

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be, and were, used to transport products for various shippers (J.S. 5a–6a).

evidence at length (J.S. 5a–7a), and concluded that the findings were adequately supported in the record. There is no occasion for further review of these factual issues. *Radio Corporation of America* v. *United States*, 341 U.S. 412, 420; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490–491; *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 536.

2. A related argument is appellant's contention that the Commission improperly placed upon it the burden of proving that it was a contract carrier. The Commission's decision, however, does not rest on any failure of appellant to sustain its burden of proof, but on the fact that all the evidence in the record, including that presented by appellant, established that appellant was not a contract carrier under the amended definition. The argument is thus nothing more than a restatement of the contention that the Commission's findings are unsupported by substantial evidence—a contention properly rejected by the court below.

3. Appellant argues (J.S. 5, 17, 18–20) that the Commission improperly relied upon the number of its contracts as a basis for concluding that appellant was engaging in common carriage. It stresses the proviso in Section 209(b) which prohibits the Commission from limiting the number of contracts a contract carrier may have.

That prohibition, however, is expressly inapplicable if the Commission finds that the scope of the carrier's additional operations is not confined to those of a con-

tract carrier under the amended definition. Furthermore, one of the terms of the amended definition is that the carrier have contracts with only a "limited number of persons." Finally, as this Court recently pointed out (*Interstate Commerce Commission* v. *J-T Transport Co.*, 368 U.S. 81, 85–87), the amended definition of contract carrier "changed the result of our decision in *United States* v. *Contract Steel Carriers*," 350 U.S. 409, that "a contract carrier, rendering a specialized service in the sense that it hauled only a limited group of commodities over irregular routes, did not become a common carrier because it reached for new business within the limits of its license." In short, as the Commission correctly held (J.S. 13a, 14a), the number of a carrier's contracts, while not conclusively determinative of its status, is plainly both a relevant and an important factor in deciding whether a carrier "holds itself out to serve the general public" and is thus a common carrier.

4. Finally, appellant argues (J.S. 21–23) that the Commission improperly included in the certificate a prohibition against "tacking," that is, joining separate operating authorities in order to perform a through service. The argument is that common carriers other than contract carriers whose permits have been converted to certificates under Section 212(c) are permitted to tack, and that since Congress did not change the definition of common carrier, it intended converted contract carriers to have the same tacking rights as other common carriers.

The argument rests upon a misconception. All common carriers do not have the right to tack, and "Restrictions against tacking are not uncommon in certificates issued by us in proceedings involving proof of public convenience and necessity" (*T. T. Brooks Trucking Co., Inc., conversion application, supra,* 81 M.C.C. at 572). The Commission has historically and repeatedly imposed such restrictions.[5] In the present case, the prohibition against tacking was fully justified in order to implement the requirement in Section 212(c) that the certificate of a converted contract carrier "shall authorize the transportation * * * of the same commodities between the same points or within the same territory as authorized in the permit." As the Commission explained in the *Brooks* case, *supra,* at p. 572, in imposing a similar prohibition on tacking: "[T]o authorize a converted carrier to perform a through service over a combination of its present routes would be akin to authorizing the transportation, as a common carrier, of traffic between points or territories not previously authorized by that carrier's permits. Such a result would be contrary to the wording of the statute * * *."[6]

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[5] *Coastal Tank Lines, Inc., Extension—Delaware City,* 73 M.C.C. 189; *John E. Muth Extension, Kentucky to Eastern States,* 69 M.C.C. 187; *Delcher Bros. Storage Co., Extension—California,* 68 M.C.C. 51; *Direct Transport Co. of Kentucky, Inc., Extension,* 68 M.C.C. 151; *Transport Co. of Virginia Extension,* 43 M.C.C. 716; *Zirbel—Investigation of Operations,* 53 M.C.C. 684.

[6] Since the Commission's prohibition on tacking is justified by its statutory authority to limit the carrier to the same points and territories authorized by the permit, there is no occasion here to consider the alternative ground upon which

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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FEBRUARY 1963.

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the district court upheld the restriction, namely, that it is justified "to maintain substantial parity with the operating authority contained in Tar Asphalt's contract carrier permits" (J.S. 7a). The question whether, in order to achieve "substantial parity" between a converted carrier's permit and certificate, the Commission may limit the certificate authority to movements from, to or between facilities of particular types of businesses, is presented in the government's appeal in *United States* v. *J. B. Montgomery, Inc.*, pending on Jurisdictional Statement, No. 791, this Term.

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